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led to take the course that he did through concern felt for a brother who was accused of a crime and whose case would be affected by respondent's attitude. The court held that, while the respondent had been clearly guilty of unprofessional conduct, the offense, under the circumstances of the case, should not be regarded as of a sufficiently grave nature to call for total disbarment, but that respondent should be suspended from practice for a period of six months, an order that was subsequently modified somewhat in respondent's favor on account of a petition from the bar of the county in which he had practiced. In *People v. McCabe*, 18 Col. 186, 32 Pac. Rep. 280, 36 Am. St. Rep. 270, 19 L. R. A. 231, proceedings for disbarment were taken against defendant for advertising for divorce business. It was shown in mitigation that defendant advertised in entire ignorance that it was wrong; that he ceased so to do in deference to the court upon the commencement of the proceedings, and that if the court should adjudge such advertising to be wrong or to be malconduct in office as an attorney, within the meaning of the statute, he would cheerfully abide by and obey the directions of the court. In view of the showing, the court concluded that defendant should be suspended from practice for the period of six months and until all costs of the proceedings should be paid by him. See, also, *People v. Taylor*, 32 Col. 250, 75 Pac. Rep. 914. Where an attorney altered an undertaking, and without procuring its re-execution or re-acknowledgment, used it upon an application for an attachment, he was held guilty of professional misconduct, but in view of his youth and inexperience (he had been admitted to the bar less than a year), the court concluded that "he would be sufficiently punished and the honor of the profession vindicated" by a judgment of suspension from practice for two years. In *re Goldberg*, 79 Hun, 616, 29 N. Y. Supp. 972. In *People v. George*, 186 Ill. 122, it was held that an attorney who had been convicted of a felony should be disbarred, although pardoned by the Governor of the State, the reason being that the pardon does not restore the "good moral character" required by the statute of members of the bar. See, also, *People v. Gilmore*, 214 Ill. 569.

As compared with the orders in the foregoing cases, the order in the case under review was lenient in the extreme, and it will doubtless be regarded by many as altogether too lenient.

H. B. H.

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IS THE PROPERTY OWNER NEGLIGENT IF HE FAILS TO EXERCISE REASONABLE CARE TO PREVENT AN INJURY TO AN INFANT TRESPASSER?—This vital and important question has recently been answered in the negative by the Supreme Court of Errors of Connecticut, *Wilmot v. McPadden*, 65 Atl. R. 157. The facts are these. Defendants were demolishing an old dilapidated house on a lot entirely uninclosed. It was in a populous city and plaintiff's intestate, a boy seven and one-half years old, lived in the next house. Saturday night there remained of the house only the foundations, the first floor and two brick chimneys. No attempt of any kind was made to keep people away. On Sunday afternoon the intestate and some other boys were playing there and a chimney fell, killing him. There was some evidence tending to show that intestate and another boy, somewhat older, had pried some bricks out of the

chimney, thereby causing it to fall. On this point the court charged the jury as follows: "If you find that said buildings and chimneys were left in a safe condition by the defendants and that the chimney causing the injury was rendered dangerous and unsafe solely by the improper conduct of this boy, Alva, (the intestate), or his associates, which was the sole cause of its toppling over and falling, you should find for the defendants, unless you further believe and find from the evidence that such conduct and action on the part of the children could have been fairly and reasonably contemplated upon the part of the defendants."

This charge the higher court holds erroneous on the ground that the owner of property owes no duty to a trespasser except to refrain from inflicting a wilful injury and that this duty is no greater because the trespasser is an infant.

The question is not a new one, the principles involved are simple, but the courts divide quite sharply, reaching opposite conclusions. The common law has ever been jealous to protect the rights of the owner in the use and enjoyment of his property, and real property, especially, has been the object of its tender solicitude. This is readily understood when we recall how relatively insignificant personal property was at no very remote period and the transcendent importance of real property under the old feudal system. The law said to the owner, "You may do with your own as you will and may at your pleasure exclude any or all." One who intentionally or inadvertently put his foot on another's land was a trespasser and liable to respond to the owner in damages. Yet this dominion was not absolute, but limited to some extent by the doctrine *sic utere tuo ut alienum non laedas*. So a man could not with impunity maintain upon his land anything that would materially interfere with his neighbor's enjoyment of his land. This doctrine, however, could be invoked by that neighbor only if he staid at home. If without invitation, express or implied, he went upon another's land, he became a licensee or trespasser, as the case might be, and then he could demand only that the owner of the land upon which he went should refrain from doing him wilful injury. He could not require of such owner any care to keep his premises in such condition as would be likely to prevent any injury, however severe or however probable. Except as to wilful injury, he took his life in his hands. He was a *trespasser*. No motive or intent was necessary, so a child, regardless of its age, became a trespasser by any act that would produce that result in case of an adult, and, equally with the latter, liable for damages caused by such trespass. But is the landowner under no duty to a child of tender years except to refrain from inflicting intentional injury? May he maintain upon his premises, things dangerous and attractive, and leave the same entirely exposed and the property uninclosed? May he do this where children are likely to come, children so young as certainly to yield to the inclination that no one expects them to resist? May the little bodies be maimed and even the precious lives be destroyed with impunity? And is all this possible though it could easily have been foreseen and easily have been prevented? Is the law so at variance with every impulse of the heart? When the crippled child calls for redress, must the law turn to him a deaf ear, because he is a tres-

passer? When the little prattler dearer to some one than life looks to us confidently for protection, shall we give him instead advice that is unintelligible and say to him, "Do not trespass?"

But the answer to all these questions is to be found in the answer to a further question, viz., is the right to property under the common law so sacred as to make it impossible to impose a burden however slight upon the owner to use reasonable care to prevent foreseeable injury to a trespasser so young as not to be chargeable with contributory negligence?

Some courts have given one answer and some the other. Let us first consider some cases which absolve the owner from any liability. They are grounded upon the propositions that a man in the use and enjoyment of his land is under no obligation to exercise any care to avoid injury to a trespasser. Put in the form of a syllogism it is this. All trespassers assume all risks except that of wilful injury. These children are trespassers. Therefore, they assume all risks except of wilful injury. It looks logical. It is beautifully simple. But it is also *brutally cruel*.

A child of seven is injured by an unboxed pulley. No recovery. *Uttermohlen v. Bogg's Run &c. Co.*, 50 W. Va. 457, 55 L. R. A. 911. A child of five was attracted by a fire unguarded on an open lot and was burned to death. No recovery. *Paolino v. McKendall*, 24 R. I. 432, 60 L. R. A. 133. A child of five falls into an unguarded excavation near streets and residences and is drowned. No liability. *S. F. & W. Ry. v. Beavers*, 113 Ga. 398. A licensee of less than six years was injured by an uninclosed and unfastened turn-table. No recovery. *Walsh v. Fitchburg R. R. Co.*, 145 N. Y. 301. Defendant left several street cars standing for days in the street in violation of an ordinance and plaintiff's child of ten, while playing with other children on these cars, was fatally injured by the recoil of a brake. Defendant not liable. *Gay v. Essex Elec. Ry. Co.*, 159 Mass. 238. A child of five was playing on an unguarded turn-table. His sister, thirteen years old, fearing he would be injured went to his rescue and her foot was so crushed as to necessitate amputation. No recovery. *D. L. & W. R. R. Co. v. Reich*, 61 N. J. L. 636. An infant, not yet five years of age, was drowned in a stone quarry coming to the street line and entirely uninclosed even on the street side. Recovery denied because the child fell from a part of the lot instead of from the sidewalk, though he was very near the latter. *Stendal v. Boyd*, 73 Minn. 53. In *Gillespie v. McGown*, 100 Pa. St. 144, a child less than eight fell into an open well on an unfenced lot. Recovery denied.

In full accord with the preceding cases are the following: *Frost v. Eastern R. R.*, 64 N. H. 220; *Hargreaves v. Deacon*, 25 Mich. 1; *Ratte v. Dawson*, 50 Minn. 450; *Ryan v. Tower*, 128 Mich. 463. As seeming to support this view though distinguishable in some respects on their facts, see *Stimson v. Gardiner*, 42 Me. 248; *Moran v. Pullman &c. Co.*, 134 Mo. 641; *Klix v. Nieman*, 68 Wis. 271; *O'Leary v. Brooks Elevator Co.*, 7 N. D. 554; *Fitzpatrick v. Cumberland Glass Co.*, 61 N. J. L. 378.

In some of these cases the opinions would indicate that any other conclusion would make the property owner an *insurer* of the safety of infant trespassers and obliged at his *peril* to keep them from harm. They have con-

jured up imaginary cases where no one would claim that the infant had a right to protection, and have concluded that because in such cases there could be no recovery, there could be none in any case. See particularly, *Ryan v. Tower*, *Gillespie v. McGown*, *Frost v. Railroad*, and *Stendal v. Boyd*, *ante*. They say that it is the duty of the parent to keep the child out of danger and that he cannot shift this duty upon another. That otherwise any person who saw a young child in imminent danger of injury and made no effort to prevent it would be liable to respond in damages to the child. There was a time, though the admission is humiliating, when the negligence of the parent was imputed to the child so as to charge the latter with contributory negligence and thus defeat his recovery. But this absurd view has been almost universally abandoned and a reliance upon it is enough to condemn any who invoke it. That the non-interfering third person is liable, in no sense follows as a necessary or even possible corollary, from the proposition that the property owner is liable. It is believed that the distinction between the creation or continuance of dangerous conditions upon one's own property and a mere passive failure to protect a child from a danger due to another's act is so patent as to require no discussion. The courts that assert that the property owner owes some duty, do not make him liable under all circumstances. He is answerable only for his negligence, for a failure to use *reasonable care* to avoid a foreseeable injury to an infant though technically a trespasser. On this ground it would seem possible to sustain the cases of *Holbrook v. Aldrich*, 168 Mass. 15; *Ritz v. Wheeling*, 45 W. Va. 262, 43 L. R. A. 148; *Buch v. Armory Man'f'g Co.*, 60 N. H. 257, though it is admitted that Massachusetts denies the existence of any duty to a trespasser adult or infant except that no wilful harm be done him. This seems also to have been the New Hampshire view, but the late case of *Hobbs v. Blanchard*, 65 Atl. 382, seems to change the rule.

We will now take up the cases that maintain the contrary doctrine. The earliest case appears to be *Lynch v. Nurdin*, 1 Adol. & El. 29, decided in 1840. A man had left a horse and cart unsecured in the street. A little child climbed upon the cart and another child started the horse, causing injury to the one on the cart. Held, defendant was liable, because, while the child was technically a trespasser, such injury could have been foreseen as probable, and it was the duty of the owner to use reasonable care to prevent injury to children so young as likely to yield to their childish instincts. It is conceded, of course, that the child had a right to be on the street, but so had the horse and cart. The child had no right to get upon the cart and yet the duty to be careful was imposed upon the driver. It has been claimed that later cases, particularly *Mangan v. Attertan*, L. R. 1 Ex. 239, have overruled this case, but in *Harold v. Watney*, in the Court of Appeal, SMITH, L. J., said that *Lynch v. Nurdin* had never been overruled and had been treated in subsequent cases as good law. 2 Q. B. 320, 1898.

The question was first presented to the United States Supreme Court in *Railroad Company v. Stout*, 17 Wall. 657. Here a child of six had trespassed upon a turn-table which was unsecured and in an open place, and had received serious injuries. It was held that the negligence of the company was properly submitted to the jury.

This has been followed in the same court in *Union Pac. Ry. Co. v. McDonald*, where a boy of twelve fell into a burning slack pile which was entirely unguarded. 152 U. S. 262. Other cases allowing recovery because of injuries received by infants while trespassing upon a turn-table exposed and unsecured, are *Kansas City Ry. Co. v. Fitzsimmons*, 22 Kan. 686, 31 Am. Rep. 203; *Barrett v. So. Pac. Ry. Co.*, 91 Cal. 296, 25 Am. St. Rep. 186; *Callahan v. Eel River R. R. Co.*, 92 Cal. 89; *Keffe v. M. & St. P. Ry. Co.*, 21 Minn. 207, 18 Am. Rep. 397; *O'Malley v. St. P., M. & M. Ry.*, 43 Minn. 289, 45 N. W. 440; *Nagel v. Mo. Pac. Ry. Co.*, 75 Mo. 653, 42 Am. R. 418; *Ft. W. & D. C. Ry. Co. v. Robertson*, — (Tex.) —, 14 L. R. A. 781; *Ihwaco Ry. & Nav. Co. v. Hedrick*, 1 Wash. 446, 25 Pac. Rep. 335; *Ferguson v. Columbus Ry.*, 75 Ga. 637, (but compare *S. F. & W. Ry. v. Beavers*, ante); *A. & N. Ry. Co. v. Bailey*, 11 Neb. 332; *Evanisch v. G. C. & S. F. Ry. Co.*, 57 Tex. 126; *G. C. & S. F. Ry. Co. v. McWhirter*, 77 id. 356.

This rule was applied to things other than turn-tables in the following cases: *City of Pekin v. McMahan*, 154 Ill. 141, 45 Am. St. Rep. 114 (child drowned in gravel pit); *Harriman v. Pittsburg & C. Ry. Co.*, 45 Ohio St. 11, 4 Am. St. Rep. 507 (torpedo left on railroad near crossing); *Westfield v. Levi Bros.*, 43 La. Ann. 63 (child injured by street roller); *Whirley v. Whiteman*, 1 Head 609 (child caught in unboxed gearing); *Brinkley Car Co. v. Cooper*, 60 Ark. 545 (child injured in pool of boiling water); *Kopplekom v. Colo. Cement Pipe Co.*, 16 Colo. App. 274 (infant killed by cement pipe); *Briggs v. Wire Co.*, 60 Kan. 217 (uninclosed machinery); *Hydraulic Works Co. v. Orr*, 83 Penn. St. 332 (falling platform); *Rachmel v. Clark*, 205 Penn. 314; *Mackey v. Vicksburg*, 64 Miss. 777 (excavation). Very similar are *Birge v. Gardiner*, 19 Conn. 507, 50 Am. Dec. 261 (falling gate); *Brennan v. F. H. & W. R. R. Co.*, 45 Conn. 284; *Bronson's Adm'r v. Labrot*, 81 Ky. 638; *I. P. & C. Ry. Co. v. Pitzer*, 109 Ind. 179.

Nebraska, Texas, Minnesota, and Pennsylvania seem inclined to give this beneficent rule a very limited operation. The first three apparently to turn-tables. *Richards v. Connell*, 45 Neb. 467; *Dobbins v. M. K. & T. Ry. Co.*, 91 Tex. 60; *Ratti v. Dawson*, ante; *Gillespie v. McGown*, ante.

The most careful, exhaustive, and convincing opinion that has ever been written on either side of this question is that of WEAVER, J., in *Edgington v. B. C. R. & N. Ry. Co.*, 116 Iowa 410, 57 L. R. A. 561. In this case an infant of seven years and eight months was allowed to recover for injuries sustained while playing upon an unguarded turn-table. This opinion leaves nothing to be said upon this side of the case.

In *Townsend v. Wathen*, 9 East 277, the defendant was held liable for luring his neighbor's dogs into traps baited with meat. According to this case it seems necessarily to follow that if a slave child was attracted to his injury or death by something likely to produce that result on the land of another than his master, such master would have a right to recover. Of course we recognize that this recovery would be in the interest of the master rather than of the child, but two facts remain: (1) That such a rule would have a powerful tendency to protect the child, and (2) that the burden upon the landowner would be as onerous as if the child were not a chattel. Is the free child to

be denied this protection because he happens to be a juristic person and the subject of rights? It seems inconceivable that he is.

Some courts have based their holdings in favor of the child on the ground that a thing attractive to him is an implied invitation and he thereby ceases to be a trespasser. But this is at best a fiction, for "Temptation is not invitation," and fiction has been overworked in the common law, and is entitled to be, and should be retired. We prefer to put the infant's right to recover on the broad ground that the owner of property is under a legal duty to exercise reasonable care to avoid an injury to a trespasser of tender years, where such injury was foreseeable. This duty need not be onerous. It is a fact at once startling and incontrovertible that in almost all the cases the injury could have been prevented by slight care and at a trifling expense. We are not satisfied with those courts that say that any such duty upon the property owner can be imposed only by the legislature, for the reason that such statement is not true. That it is not true is shown by the fact that the majority of courts have reached an opposite conclusion and they are sustained in such conclusion by the fact that all admit who know what is meant by the common law, viz., that it is not crystallized but is vital, and owes its present importance, if not its existence, to its adaptability to new conditions. F. L. S.

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LIABILITY OF WATER COMPANIES FOR LOSSES BY FIRE.—Since water companies and the business of supplying cities and their inhabitants with water for city and domestic uses, and for fire protection have become so common, the courts have been called upon many times to determine the rights of the property owning inhabitant, the city and company in their relations to each other. Probably the question most frequently litigated is the liability of the water company to the property owner for loss by fire due to the failure of the company to fulfill the terms of its contract with the city, there being no contract between the party complaining and the company.

In a large number of cases the attempt has been made to recover on the basis of the rule of law giving the beneficiary of a contract the power to sue in his own right for a breach thereof, even though there was no privity of contract between him and the party sued. In a few cases the water company has been held liable on this theory, but there is no doubt that the great weight of authority, numerically at least, is to the contrary. Among the cases adopting the former view are: *Paducah Lumber Co. v. Paducah Water Supply Co.* (1889), 89 Ky. 340, and *Gorrell v. Greensboro Water Supply Co.* (1899), 124 N. C. 328; while among the cases supporting the opposite rule are the following: *Nichol v. Huntington Water Co.* (1903), 53 W. Va. 348, 44 S. E. 290; *Town of Ukiah City v. Ukiah Water and Imp. Co.* (1904), 142 Cal. 173, 75 Pac. 773; *Blunk v. Denison Water Supply Co.* (1905), 71 Ohio St. 250, 73 N. E. 210; *Britton v. Green Bay Water Works Co.* (1892), 81 Wis. 48; *Howsmon v. Trenton Water Co.* (1893), 119 Mo. 304; and *Fitch v. Seymour Water Co.* (1894), 139 Ind. 214, 37 N. E. 982. However, it is not the purpose of this note to more than merely mention these two conflicting views and call attention to the diversity of the decisions, for the subject has been very completely discussed in prior numbers of this REVIEW. See